

**From:** [James Turner](#)  
**To:** [Robert Dougherty](#)  
**cc:** ['eforsyth@tulstar.com'](mailto:eforsyth@tulstar.com); [Jamie Bradsher](#); ['Mark Nagle \(E-mail\)'](#)  
**Subject:** Re: FW: Followup 104e Documents  
**Date:** 10/20/2009 10:32 AM

---

Rob, thank you for your email correspondence (attached) in response to my further request for clarification of certain Tulstar 104(e) responses. Thank you also for your phone call this morning. As I indicated to you, I was out of the office for two weeks and am catching back up. I have read and reviewed your additional responses attached below, and I am preliminarily satisfied that those issues are covered, although I have not had an opportunity yet to discuss them with Ms. Bradsher and get her take on them. You had suggested a phone discussion, and I would be happy to talk further about this matter with you. Based on my schedule, I would suggest that I give you a call tomorrow (10/21) at 10:30 am. If that is not convenient, just let me know what time and date would be. Thanks again, Jim Turner

James L. Turner  
Senior Attorney  
Office of Regional Counsel (6RC-S)  
U.S. EPA Region 6  
1445 Ross Avenue, Ste. 1200  
Dallas, Texas 75202-2733  
E-Mail: [Turner.James@epa.gov](mailto:Turner.James@epa.gov)  
Ph: (214) 665-3159  
Fax: (214) 665-6460

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe you have received this communication in error, please immediately contact the sender and delete the copy you received, and do not print, copy, re-transmit, disseminate, or otherwise use the information. Thank you.

▼ [FW: Followup 104e Documents](#)

## FW: Followup 104e Documents

**Robert  
Dougherty**

to: James Turner,  
Jamie Bradsher

10/09/2009 05:18 PM

Cc: "Mark Nagle (E-mail)", "eforsyth@tulstar.com"

---

Mr. Turner, This e-mail is sent in response to your September 4th e-mail below in which you ask several follow-up questions to the 104(e) response dated August 24, 2009 submitted by this firm on behalf of Tulstar Refrigerants, Inc. (the "Initial 104(e) Response"). As you know, I previously submitted insurance documentation by letter and supplement to Tulstar Refrigerants' 104(e) response dated September 18, 2009. In response to all of the other items discussed in your e-mail, we read the EPA's initial 104(e) request again and don't see that any such additional items were requested, but Tulstar Refrigerants is willing to respond in the continued spirit of cooperation it and Mr. Nagle have shown throughout this entire process. Although Tulstar Refrigerants has already provided information beyond the scope of 104(e) as part of such cooperation, it should be noted that the scope of a 104(e) request is limited by the terms of Section 104(e)(2) of CERCLA (codified at 42 U.S.C. 9604(e)(2)) to information relating to (a) the identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a facility or transported to a facility, (b) the nature or extent of a release or threatened release of a hazardous substance or pollutant at or from a facility, or (c) information relating to the ability of a person to pay for or to perform a cleanup. Topics are addressed in the order appearing in your e-mail.

- **FIRST PARAGRAPH** - As mentioned, all insurance policies in Tulstar Refrigerants' possession and correspondence to and from the insurance companies have been provided pursuant to the Initial 104(e) Response and the supplemental 104(e) response dated September 18, 2009. Tulstar has not made any claim in the bankruptcy of John Garrison.

- **SECOND PARAGRAPH** -

- **YOUR STATEMENT** - "For example, the Tulstar press release OSC Gary Moore and the undersigned Googled off the internet that touted the joint

project of TPI and NCI to produce HFC-134a and promoting TPI's chemical expertise was not in the package, nor any other related press or promotional documents, and yet there was a significant amount said about this project in the business press that may have been sourced at least in part from Tulstar.”

- **RESPONSE** - As mentioned, we do not read any of the questions in the EPA's 104 (e) request as requesting information about press releases, but Tulstar Refrigerants is happy to respond. Attached in Attachment 1 are copies of press releases Tulstar was able to find after searching its files and the internet. With respect to the first release, Tulstar Refrigerants' best information is that the release was submitted to Chemweek magazine and posted on Tulstar's website in mid-December, 2005. Such date is corroborated by the statement in the release that Norphlet's facility has "a completion date of late in the first quarter of 2006." As discussed in Question No. 9 in the EPA's 104(e) request, in late 2005/early 2006 the entire project was in its infancy and decisions about the formation of Tulstar Refrigerants and the restatement of the agreement with Norphlet Chemical, Inc. to clarify Tulstar Refrigerants, Inc. as the appropriate party were in process. This accounts for the incorrect use of Tulstar Products' name in that release. Tulstar Refrigerants does not know the source or origin of the other attached press releases. It is believed that the incorrect references to Tulstar Products instead of Tulstar Refrigerants likely came from Norphlet or as a result of the initial press release by Tulstar as described above. As far as the expertise of Tulstar, the press releases do not refer to Tulstar's "chemical expertise," but rather its "experience in marketing and worldwide distribution" or its status as a "global sourcing and distribution company." Neither Tulstar Refrigerants nor its principals have chemical expertise in the sense of chemist/operational knowledge as the business they are in is chemicals marketing, distribution and logistics consistent with the statements in the press releases. Norphlet and its consultants promoted themselves as having the chemical expertise necessary to produce HFC-134a.

- **YOUR STATEMENT** - "Further, although you provided the formal demand letters concerning the Tulstar contention (and NCI response) that there was a breach of contract, there was nothing from what may well have been a myriad of other communications concerning the status and development of the project and processing and handling of Tulstar's materials, as well as the negotiation and resolution of the contentions between Tulstar and NCI. (It would seem highly unlikely that one would claim breach of contract with nothing else having transpired before or after the formal contentions). . . . [skipping to the end of the letter] there is a notable absence of relevant communications on this dispute and the underlying issues"

- **RESPONSE** - Reading the above statements as a whole and bearing in mind the limited scope of information requests made by the EPA pursuant to Section 104(e) (**see** 42 U.S.C. §9604(e)(2)) as noted above, I interpret the statements as seeking copies of written communications between Tulstar Refrigerants and Norphlet relating to the dispute between them regarding Norphlet's breach of the agreement and obligation to pay Tulstar Refrigerants for the raw materials thereunder (the "Dispute"). The formal demand letters were attached to the Initial 104(e) Response as evidence of Tulstar's position that it was not the owner of the raw materials at Norphlet's facility, but were not requested. Other than such formal demand letters and the correspondence included in Attachment 2 (which are Norphlet's response to the first demand letter and a June 1, 2009 letter from Tulstar Refrigerants to Norphlet), the only other communication between Tulstar Refrigerants and Norphlet pertaining to the Dispute was a verbal discussion with David Henry of Norphlet. Norphlet's August 4, 2008 written response, which is attached in Attachment 2, corroborates the lack of prior communications regarding the Dispute as its attorney states that "Norphlet does not feel that there is a dispute between Norphlet and Tulstar Refrigerants . . ." Following Tulstar Refrigerants' August 22, 2008 second demand letter, subsequent communications related to removing the unused HF from the Site which led to the communications with the Arkansas Economic Development Commission ("AEDC") in February of 2009 that were provided as part of Attachment 5 to the Initial 104(e) Response, the negotiation of the HF removal agreement between Tulstar Refrigerants, Norphlet and Solvay Flourides, LLC, and the EPA's eventual involvement at the site. During that process, it became apparent to Tulstar Refrigerants that Norphlet was insolvent and monetary claims against Norphlet were not pursued as focus turned to removing the HF due to public safety concerns as previously discussed which, as you know, was safely completed primarily due to the efforts of Tulstar Refrigerants as a good corporate citizen. The attached June 1, 2009 letter demands indemnity from Norphlet as part of Tulstar Refrigerants' attempts to obtain recoveries and defense assistance from Norphlet's insurance carriers which have been unsuccessful.

- **YOUR STATEMENT** - "Although copies of some documents provided earlier by you, or obtained elsewhere, suggested that all or parts of the raw material remained the property of Tulstar, and Tulstar Refrigerants later reported to the IRS that it had received \$274,000 in income for 2008, there is a notable absence of relevant communications on this dispute and the underlying issues."

- **RESPONSE** - There was no actual income received by Tulstar Refrigerants. Tulstar Refrigerants was dissolved by administrative error in December, 2008, and the 2008 tax returns were prepared before the error was corrected. The original 2008 tax return submitted for Tulstar Refrigerants, Inc. was a final return. As such, tax entries were made

to clear out all asset and liability accounts. Thus, the liability of Tulstar Products was eliminated against income and the asset (receivable from Norphlet) was eliminated against expense. Again, no income was "received" by Tulstar Refrigerants. Upon realization of the administrative error, however, Tulstar Refrigerants was revived under Nevada law as documented in Attachment 8 to the Initial 104(e) Response and the 2008 tax return was subsequently amended to reverse the prior closing entries. I have attached a copy of the amended 2008 return for your reference as Attachment 3 hereto. With regard to the statement regarding ownership of raw materials on site at Norphlet's facility, please review Tulstar Refrigerants' response to Question No. 2 in the Initial 104(e) Response. Tulstar Refrigerants has been consistent in its position all along that it did not own the raw materials at Norphlet's facility and the terms of the agreement strongly support that position. There have been incorrect, in most cases, self-serving statements made by Jones-Hamilton, Norphlet and the AEDC in various documents which have been provided in the Initial 104(e) Response and other correspondence to the EPA alleging or implying that Tulstar Refrigerants owned the raw materials, but again, those statements are incorrect.

- **LAST PARAGRAPH** - The only potentially responsive items that have not been produced by Tulstar Refrigerants and Tulstar Products in response to your e-mail or the initial 104(e) request are e-mail or other written correspondence between Tulstar Refrigerants and its attorneys to which the attorney-client privilege applies and is asserted. No responsive information has been withheld as confidential business information.

## **-CONCLUSION-**

In closing, please feel free to contact me with additional questions as Tulstar Refrigerants' desires to continue its cooperation with the EPA to resolve this matter. As we have discussed at length in our prior correspondence submitted by Tulstar Refrigerants to the EPA including the Initial 104(e) Response, neither Tulstar Refrigerants nor Tulstar Products should be considered potentially responsible parties as "arrangers" or otherwise for the environmental remediation undertaken by the EPA at Norphlet's facility under well-established principles of law and based on the facts as we have conveyed to you. As discussed at length with citations of authority in the Initial 104(e) Response, my May 11, 2009 letter to Jamie and my February 27, 2009 letter to Elena Forsyth which was attached to the May 11<sup>th</sup> letter (all of which letters are attached for ease of reference in Attachment 4 to this e-mail), established case law requires three elements to be present as a prerequisite to liability as an "arranger" under CERCLA which are that (1) the supplier retains an ownership interest in the materials throughout the formulation process as well as the finished product, (2) the generation of hazardous wastes was inherent in the formulation

process, and (3) wastes were in fact generated and disposed. Without even considering the third condition, the information and materials which have been provided by Tulstar clearly establish that the first two elements are not present with respect to Tulstar Refrigerants. As we discussed at the June meeting and in the letters attached in Attachment 4, Tulstar Refrigerants did not retain, and would not have retained, ownership in the materials throughout the formulation process as Norphlet obtained title to the raw materials pursuant to the terms of the agreement and Jones-Hamilton was under contract to purchase one of the two finished products, HCL. With respect to the second element, only two valuable products would have been produced without any hazardous wastes had Norphlet performed as promised and produced the HFC-134a and HCL. As also previously indicated, Tulstar Products was not a party to the contract with Norphlet and has been mistakenly included in your correspondence relating to this matter.

It is our sincere hope that Tulstar Refrigerants' complete cooperation and the information that it has provided will lead you to focus on the true responsible parties in this situation, which are Norphlet, Jones-Hamilton and their officers, employees and representatives. Both of those companies were intimately involved with the attempts to manufacture HFC-134(a) at Norphlet's facility, had control of funding used to undertake those efforts, and controlled and made the decisions to abandon the facility with hazardous materials remaining on site. Thus, both Norphlet and Jones-Hamilton are clearly "operators" subject to liability under 42 U.S.C. § 9607(a) and responsible parties under CERCLA.

Regards,

Rob Dougherty

Robert F. Dougherty, Esq.  
Hall, Estill  
320 South Boston Avenue, Suite 200  
Tulsa, Oklahoma 74103  
Telephone: (918) 594-0412  
Facsimile: (918) 594-0505  
E-Mail: RDougherty@HallEstill.com

---

**From:** Turner.James@epamail.epa.gov [mailto:Turner.James@epamail.

epa.gov]

**Sent:** Friday, September 04, 2009 1:48 PM

**To:** Robert Dougherty

**Cc:** Bradsher.Jamie@epamail.epa.gov

**Subject:** Followup 104e Documents

PRIVILEGED AND CONFIDENTIAL - FOIA EXEMPT - DO NOT  
RELEASE

Re: Your letter (104e response) on behalf of Tulstar dated August 24, 2009

Mr. Dougherty, there are some documents that I have identified as not included in your 104e submission on behalf of Tulstar that should be. Among these are the fax (and any attachments) of Mr. Mark Blongewicz of your firm to Zurich/Steadfast of 8/03/09 referenced in the materials furnished, along with a copy of the letter of Jennifer Phillips of Zurich/Steadfast of July 29, 2009, that is referenced in her letter of August 5, 2009. Further, full copies of any claims submitted by Tulstar (and insurer's responses) on the insurance policies for NCI, or any other relevant claims, would also be deemed responsive to the 104e request. This would include for example, any claim submitted by Tulstar in the bankruptcy of John Garrison. I understand from your letter that you are attempting to obtain copies of the insurance policies for the coverage and the periods indicated on the declarations pages you provided where policies were not attached. Please provide those as soon as they are available.

Other documents that should seemingly be present are absent. For example, the Tulstar press release OSC Gary Moore and the undersigned Googled off the internet that touted the joint project of TPI and NCI to produce HFC-134a and promoting TPI's chemical expertise was not in the package, nor any other related press or promotional documents, and yet there was a significant amount said about this project in the business press that may have been sourced at least in part from Tulstar. Further, although you provided the formal demand letters concerning the Tulstar contention (and NCI response) that there was a breach of contract, there was nothing from what may well have been a myriad of other communications concerning the status and development of the project and processing and handling of Tulstar's materials, as well as the negotiation and resolution of the contentions

between Tulstar and NCI. (It would seem highly unlikely that one would claim breach of contract with nothing else having transpired before or after the formal contentions). Although copies of some documents provided earlier by you, or obtained elsewhere, suggested that all or parts of the raw material remained the property of Tulstar, and Tulstar Refrigerants later reported to the IRS that it had received \$274,000 in income for 2008, there is a notable absence of relevant communications on this dispute and the underlying issues.

If you contend any responsive documents are privileged, then you must nevertheless sufficiently identify them (along with any other otherwise responsive documents withheld) in writing and the nature and basis of the privilege that is claimed. A blanket privilege claim or reservation, such as that vaguely set forth at the bottom of page 3 of your letter, will not suffice. Further, if you contend that any documents or parts of documents withheld are confidential business information (CBI), then you must nevertheless submit them along with your CBI claim in compliance with the relevant provisions of 40 CFR Part 2, Subpart B.

James L. Turner  
Senior Attorney  
Office of Regional Counsel (6RC-S)  
U.S. EPA Region 6  
1445 Ross Avenue, Ste. 1200  
Dallas, Texas 75202-2733  
E-Mail: [Turner.James@epa.gov](mailto:Turner.James@epa.gov)  
Ph: (214) 665-3159  
Fax: (214) 665-6460

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient, or believe you have received this communication in error, please immediately contact the sender and delete the copy you received, and do not print, copy, re-transmit, disseminate, or otherwise use the information. Thank you.



This e-mail message and any attachment thereto is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law.

If the recipient or reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this e-mail communication in error, please notify us immediately by sending a reply e-mail message to the sender. Thank you.

Hall, Estill

320 S. Boston Ave.

Suite 200

Tulsa, Oklahoma 74103

(918) 594-0400

[www.hallestill.com](http://www.hallestill.com)[attachment "Attachment 1.pdf" deleted by James Turner/R6/USEPA/US] [attachment "Attachment 2.pdf"

deleted by James Turner/R6/USEPA/US] [attachment "Attachment 3.pdf" deleted by James Turner/R6/USEPA/US] [attachment "Attachment 4.pdf" deleted by James Turner/R6/USEPA/US]